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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 472

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, AMERICAN LOUISIANA PIPE LINE COMPANY, ET AL., *Respondents*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
AMERICAN LOUISIANA PIPE LINE COMPANY,
COUNTY OF WAYNE, MICHIGAN,
MILWAUKEE GAS LIGHT COMPANY,
WISCONSIN FUEL AND LIGHT COMPANY,
NATURAL GAS DISTRIBUTORS, INC.,
STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN,
CITY OF DETROIT,
WISCONSIN PUBLIC SERVICE CORPORTION,

Respondents

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Panhandle Eastern Pipe Line Company, respectfully petitions this Court to grant writs of certiorari to review decisions of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, are *Michigan Consolidated Gas Company, et al.* v. *Federal Power Commission, et al.*, Nos. 14,975, 14,976, 14,977, 15,061, 15,065, 15,070, 15,073, 15,074, 15,077, 15,093 and 15,144, decided April 29, 1960 (reprinted as Appendix I, *infra*, p. 1a); the opinion denying rehearing *en banc*, filed July 11, 1960 (reprinted as Appendix II, *infra*, p. 34a); and *Michigan Consolidated Gas Co.* v. *Federal Power Commission, et al.*, No. 15,358, decided July 11, 1960 (reprinted as Appendix V, *infra*, p. 77a). The Court of Appeals' decisions reversed the orders of the Federal Power Commission in *American Louisiana Pipe Line Company*, 20 F.P.C. 575 (1958) (reprinted as Appendix III, *infra*, p. 38a), rehearing denied, 21 F.P.C. 218 (1959) (reprinted as Appendix IV, *infra*, p. 53a), and *American Louisiana Pipe Line Co.*, decided June 16, 1959 (reprinted as Appendix VI, *infra*, p. 83a) and remanded the cases to the Federal Power Commission for further proceedings not inconsistent with its opinions.

JURISDICTION

The judgment of the Court of Appeals in Nos. 14,975, 14,976, 14,977, 15,061, 15,065, 15,070, 15,073, 15,074, 15,093, and 15,144 was entered on April 29, 1960. A timely petition for rehearing *en banc* was denied on July 11, 1960. The judgment of the Court of Appeals in No. 15,358 was entered on July 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1958).

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals has the power under 15 U.S.C. § 717r (1958) to remand a case to the Federal Power Commission on the ground that the Commission must hold further hearings and consider a "settlement proposal" advanced by the losing party to the proceeding before the Commission where:

   (a) Protracted evidentiary hearings had been held and concluded, and a final order entered, *prior* to the tender of the "settlement proposal;"

   (b) The proposal was not urged in the losing party's petition for rehearing before the Commission and was advanced for the first time five days *after* the time for filing a petition for rehearing had passed;

   (c) The proposal would require a substantial modification of the Commission's decision.

   In other words: whether the courts may circumvent, and indeed nullify, the plainly expressed intent of the Congress that proceedings before regulatory agencies shall be governed by strict rules which require the orderly termination of such proceedings and do not permit parties to prolong such termination indefinitely by filing unauthorized documents (in this case denominated "settlement proposal") *after* expiration of the time fixed by statute for filing petitions for rehearing has passed.

2. Whether a United States Court of Appeals may make a determination that a particular finding by

the Federal Power Commission cannot of itself support one of its conclusions, on the *sole* basis that the finding appeared only in the Commission's opinion denying rehearing and not in its original opinion.

PERTINENT STATUTES AND REGULATIONS

Because the provisions involved are lengthy, only their citation will be given at this point. Their pertinent text is set forth in Appendix VII to this petition, *infra*, p. 88a *et seq.*

Natural Gas Act of June 21, 1938, c. 556, § 19(a), (b), 52 Stat. 831, 15 U.S.C. § 717r(a), (b) (1958).

Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R., Part 1, Chapter I.

18 C.F.R. § 1.18 (1949).
18 C.F.R. § 1.33 (1949).
18 C.F.R. § 1.34 (1949).

STATEMENT

This case involves a dispute between Panhandle Eastern Pipe Line Company (Panhandle) and Michigan Consolidated Gas Company (Michigan Consolidated) over whether the public convenience and necessity permitted Panhandle to discontinue certain deliveries of natural gas to Michigan Consolidated some ten years after the contract between the parties expired. The Federal Power Commission, after one of the longest hearings in its history, permitted Panhandle to discontinue the service, but the United States Court of Appeals for the District of Columbia Circuit reversed the Commission and remanded the case for hearings not inconsistent with its opinion.

Panhandle is an independent pipeline company which produces, purchases and transports natural gas to more than sixty non-affiliated distributors in Texas, Kansas, Missouri, Illinois, Indiana, Michigan and Ohio. Michigan Consolidated is a subsidiary of the American Natural Gas Company (American Natural), a holding company which wholly owns the largest natural gas-distributing companies in Michigan and Wisconsin, Michigan Consolidated and the Milwaukee Gas Light Company. American Natural also wholly owns two long-distance pipelines—the Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) and the American Louisiana Pipe Line Company (American Louisiana)—in order to provide gas to its distributor subsidiaries.

Beginning in 1935, Panhandle entered into contracts with Michigan Consolidated to supply the latter with natural gas in the amount of 127,000 Mcf per day, as last amended. The contract expired on December 31, 1951. In 1951, Panhandle sought a reduction in its deliveries to Michigan Consolidated based on the greater need of its other distributors and on various expansion proposals of American Natural's pipeline subsidiaries which were believed to more than meet American Natural's need for gas and free Panhandle to supply its other distributors whose need was greater. After protracted proceedings before the Commission and the Third Circuit, Panhandle's request for reduction was denied,[1] but the ultimate denial in 1956 was

[1] *In the Matter of Panhandle Eastern Pipe Line Company*, 11 F.P.C. 375, affirmed, 11 F.P.C. 167 (1952); *Panhandle Eastern Pipe Line Company* v. *FPC*, 204 F. 2d 925 (3d Cir. 1953); *In the Matter of Panhandle Eastern Pipe Line Company*, Docket Nos. G-1116, *et al.*, decision issued April 19, 1955, affirmed by order issued June 7, 1955; *Panhandle Eastern Pipe Line Company* v. *FPC*, 236 F. 2d 289 (3d Cir. 1956).

expressly without prejudice to Panhandle's renewal of its application for abandonment when Michigan Consolidated began to receive the benefits of American Natural's continuing expansion.

The present application of Panhandle to discontinue service to Michigan Consolidated was granted by the Commission on December 19, 1958 in the following circumstances. In 1955, the Third Circuit had approved the Commission's grant to American Louisiana of a certificate of public convenience and necessity to construct a pipeline from Louisiana to Detroit having a capacity of 300,000 Mcf per day.[2] In respect to the allocation of this new gas supply, American Louisiana proposed to sell 200,000 Mcf per day to Michigan Consolidated and 100,000 Mcf per day to Michigan Wisconsin. While awaiting the outcome of the allocation proceedings which were complicated by Midwestern Gas Transmission Company's (Midwestern's) proposal to serve central Wisconsin markets with Canadian gas, which proposal was mutually exclusive with Michigan Wisconsin's proposal for service to that area, the Commission after various proceedings allocated 240,115 Mcf per day of American Louisiana's 300,000 Mcf per day capacity to Michigan Consolidated and those existing and potential Michigan Wisconsin customers which Midwestern did not propose to serve, reserving 59,885 Mcf per day for possible future allocation to the new Wisconsin markets.

When Panhandle filed its present application to discontinue service to Michigan Consolidated, American Louisiana had already filed an application to expand

[2] *American Louisiana Pipe Line Company*, Opinion No. 276 (October 1, 1954), affirmed, *Panhandle Eastern Pipe Line Company v. FPC*, 219 F. 2d 729 (3d Cir. 1955), cert. denied, 349 U.S. 945.

its 300,000 Mcf per day capacity pipeline from Louisiana to Detroit by 57,000 Mcf per day. After the hearing examiner, in June of 1958, recommended approval of American Louisiana's expansion application and denial of Panhandle's abandonment application, the Commission, in October of 1958, affirmed the trial examiner with respect to the American Louisiana expansion application, but reserved decision on the abandonment application.

On October 31, 1958, the Commission concluded the allocation proceeding, above described, between Michigan Wisconsin and Midwestern in the so-called Midwest Omnibus case, and rejected the proposals of both companies on the ground of economic and technical infeasibility.[4]

On December 19, 1958, the Commission reversed the hearing examiner and approved Panhandle's abandonment application. At the same time it allocated to Michigan Consolidated the 57,000 Mcf per day granted in American Louisiana's expansion application and also allocated to Michigan Consolidated the previously reserved 59,885 Mcf per day which, as a result of the above described Midwest Omnibus case, was now available for allocation. Thus, the Commission provided a replacement supply for the gas Panhandle had previously delivered to Michigan Consolidated.

Michigan Consolidated, among others, filed a timely petition for rehearing of the Commission's December 19, 1958 decision. Five days *after* the statutory time for filing a petition for rehearing had passed, Michigan Consolidated filed a "settlement proposal," ambiguous

[4] *American Louisiana Pipe Line Co.*, 20 FPC 575, 592, 604 (1958).

in its terms, but treated by the Court of Appeals as proposing in substance that Panhandle supply Michigan Consolidated with the same annual volume of gas as at present, but do so during the off-peak periods, thus affording Michigan Consolidated the opportunity of storing that gas for use for its peak day demands and freeing Panhandle from its peak day obligations to Michigan Consolidated. The proposal was not urged or even mentioned in Michigan Consolidated's petition for rehearing and was not acceptable to Panhandle which, along with its various non-affiliated distributors, and several state regulatory commissions, opposed the proposal. In a lengthy opinion denying rehearing of its decision of December 19, 1958, the Commission considered the proposal to the extent of obtaining the views of the parties to the proceeding, and then found that the new proposal would require a complete modification of its prior order and was inconsistent therewith.

1. The Opinions of the Federal Power Commission[1]

The opinions of the Federal Power Commission quite simply found that the public convenience and necessity permitted discontinuation of Panhandle's deliveries to Michigan Consolidated because the need for gas was greater along Panhandle's system than along that of American Natural (App. III, *infra*, pp. 42a-43a, 48a-50a). In so finding, the Commission also decided that the replacement gas allocated to Michigan Consolidated in place of the gas it would lose as a result of Panhandle's discontinuation of service was sufficient for the needs of American Natural (App. III, *infra*, pp.

[1] *American Louisiana Pipe Line Company*, 20 F.P.C. 575 (1958) (App. III, *infra*, p. 38a), rehearing denied, 21 F.P.C. 218 (1959) (App. IV, *infra*, p. 53a).

45a-48a), and that there were certain advantages to be gained from a separation of all relationship between these two natural gas systems (App. III, *infra*, p. 59a).

In its original opinion, the Commission illustrated the greater need for gas along the Panhandle system by comparing the space heating saturation[4] of Michigan Consolidated with that of Panhandle's customers—a test described by the Commission as "an objective way to approach this problem." (App. III, *infra*, p. 49a). Using the year 1958, the Commission found that 54.67% of Michigan Consolidated's residential and commercial customers used natural gas for space heating whereas only 50.4% of comparable Panhandle customers were able to obtain gas for that purpose.

In its opinion denying rehearing, the Commission reaffirmed its finding of Panhandle's greater need for the gas and used an independent and alternative test to evaluate the comparative needs—the "capacity-demand" ratio.[5] Michigan Consolidated was found to have a capacity-demand ratio of 96%, whereas Panhandle's was only 83.5% (App. IV, *infra*, pp. 59a-60a).

2. The Opinions of the Court of Appeals[6]

The original opinion of the Court of Appeals began with the premise that the present or future public convenience or necessity would permit a discontinuation of Panhandle's gas deliveries to Michigan Con-

[4] Space heating saturation refers to the percentage of residential and commercial customers who use gas for space heating. The higher the percentage, according to the criterion, the less is the need for the gas.

[5] This test showed the extent to which each system could meet the peak day demands of its customers, expressed in terms of percentages.

[6] Appendices I and II, *infra*, pp. 1a, 34a.

solidated if the three determinations used by the Commission were valid: (1) The gas supply in question could be used to greater advantage by customers of Panhandle than by customers of American Natural; (2) That each system would more efficiently procure gas supplies and serve its own customers if separated from the other; and (3) That there was sufficient unallocated gas on the American Natural system to replace the supply that Michigan Consolidated would lose by the abandonment order (App. I., *infra*, pp. 16a-17a).

The Court, however, found that a remand was necessary because of its disagreement with the Commission's calculation of relative space heating saturations, previously explained. The Court found that the saturation figures for Michigan Wisconsin's customers, as well as for those of Michigan Consolidated, should have been included in the calculation, whereas only Michigan Consolidated's customers were included. In a brief encounter with the record, the Court deduced that by the inclusion of Michigan Wisconsin's other customers, whose average space heating saturation it calculated to be 35%, the 54.76% space heating saturation attributed to Michigan Consolidated might be considerably lower.[5] (App. I, *infra*, pp. 20a-21a). The Commission

[5] The Court's 35% space heating saturation figure for Michigan Wisconsin's customers proved to be significantly erroneous. Only by excluding all of Michigan Wisconsin's customers outside the State of Wisconsin could such a figure be arrived at. The average space heating saturation for all of Michigan Wisconsin's customers was 47.45%. This crucial error of fact was recognized by the Court when on July 7, 1960 an order was entered which deftly toneped up the opinion by inserting "in Wisconsin" after "customers" in the next to the last full sentence of page 24 of its slip opinion. No intimation was given why the Michigan Wisconsin customers outside of Wisconsin were excluded from the Court's tally, or what the effect of the Court's error was on its conclusion to remand the case to the Commission.

in its opinion on rehearing had conceded that the space heating saturation of Michigan Wisconsin's customers was indeed relevant but in the circumstances not controlling, and proceeded to illustrate its overall conclusion of Panhandle's greater need by the above described capacity-demand ratio test. (App. IV, *infra*, pp. 59a-60a). Faced with the problem of two independent alternative Commission tests, both apparently supporting its basic finding of need, and one of which it disagreed with, the Court of Appeals refused to pass on the validity of the capacity-demand ratio test, finding that such test did not alone support the finding of Panhandle's greater need on the basis of the following theory:

> "Because the capacity-demand test was advanced after the Commission's original decision, it would appear that the Commission did not view it as a ground which alone would support the finding of greater need. Hence, even if this comparison were unassailable, a remand is required by our holding that the space heating comparison is fatally defective." (App. I, *infra*, p. 24a).

The Court's opinion denying rehearing is primarily devoted to a justification of its consideration of the Michigan Consolidated "settlement proposal" and is discussed more fully in the "Reasons for Granting the Writs."

On July 11, 1960, the Court of Appeals rendered its opinion and entered its judgment in *Michigan Consolidated Gas Co. v. Federal Power Commission, et al.*, No. 15,358, not yet officially reported (App. V, *infra*, p. 77a). This case sought review of the Commission's decision and order rendered June 16, 1959 (App. VI, *infra*, p. 83a), approving Panhandle's proposal to dis-

tribute 157,000 Mcf of gas among its resale customers. Of this volume, 127,000 Mcf was gas available to Panhandle as a result of the abandonment case. Because of its disposition of the abandonment case, the Court of Appeals found as to the 127,000 Mcf that the case should be remanded to the Commission for an interim allocation of the gas based on physical, financial, and equitable considerations, pending the outcome of the remand in the abandonment case.

REASONS FOR GRANTING THE WRITS

I.

THE COURT OF APPEALS WAS WITHOUT POWER TO REMAND THIS CASE ON THE ISSUE OF THE SETTLEMENT PROPOSAL AND REQUIRE HEARINGS THEREON.

The question of whether the Federal Power Commission is required to consider a "settlement proposal" in the circumstances of this case is of evident importance to the need for finality of decisions in the entire realm of federal administrative adjudication. Permitting a losing party, after decision by the agency and after the time for rehearing has passed, unilaterally to advance proposals inconsistent with the agency's decision and requiring complete modification thereof, and which would automatically require further consideration and presumably further hearings, if the consideration is to be an informed one, opens the door to possibilities for procrastination which are literally infinite. The decision and opinions of the Court of Appeals have so far departed from the mandatory jurisdictional requirements placed on both itself and the Federal Power Commission by the Congress as to call for an exercise of this Court's power of supervision.

During the past term this Court in *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 80 S.Ct. 1122 (1960), a natural gas case involving the Federal Power Commission, stated that it was particularly moved to grant certiorari in the case because of the contention that the Court of Appeals had improperly limited the appropriate scope of judicial review of the Power Commission's determination. A clearer case for the exercise of this Court's discretion is presented where the contention is that the Court of Appeals has exceeded its statutory jurisdiction as circumscribed by the Congress in the governing Federal Power Commission decision.

The Court of Appeals Was Without Jurisdiction to Consider the "Settlement Proposal"

Michigan Consolidated's "settlement proposal" was outside the jurisdiction of the Court of Appeals because it was not urged before the Commission in the application for rehearing of the Commission's December 19, 1958 abandonment order. Assuming *arguendo* that the Commission had jurisdiction to consider the proposal, its consideration by the Court of Appeals was prohibited by Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which provides in pertinent part:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. . . ."

Michigan Consolidated's application for rehearing the December 19, 1958 abandonment order did not contain any reference to the matter revealed for the first time in its untimely "settlement proposal," which

was filed five days after the time to petition for rehearing had passed. This Court has uniformly enforced the salutary policy enunciated in Section 19(b) by holding that a United States Court of Appeals is precluded from considering argument not urged in a timely petition for rehearing before the Commission. *Panhandle Eastern Pipe Line Company* v. *FPC*, 324 U.S. 635, 649 (1945); *NLRB* v. *Seven Up Bottling Co.*, 344 U.S. 344, 350 (1953); *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498 (1955).

Michigan Consolidated's procedural device to circumvent the Congressional intent and policy expressed in Section 19(b) should not be countenanced by this Court. When the Commission rejected the untimely "settlement proposal" in its February 13, 1959 opinion denying rehearing, Michigan Consolidated filed a petition for rehearing within thirty days after the Commission's opinion denying rehearing. The Court of Appeals in its opinion denying rehearing held that this second petition of Michigan Consolidated for rehearing conferred jurisdiction on the Court of Appeals to consider the "settlement proposal" in connection with the abandonment order.

This maneuver results in a plain evasion of the mandate of Section 19(b). While Michigan Consolidated's review petition in the Court of Appeals in No. 15,144 purported to seek review of the Commission's order of February 13, 1959 rejecting the untimely "settlement proposal," it was the order of December 19, 1958 permitting abandonment which constituted Michigan Consolidated's real and only grievance; it was that order which effectively denied Michigan Consolidated the continued involuntary deliveries of natural gas by Panhandle. The "settlement proposal" sought the

exact opposite of what the Commission had originally ordered: it sought continuation of the involuntary gas deliveries. When the substance of Michigan Consolidated's "settlement proposal" is considered, the February 13, 1959 Commission order rejecting the proposal amounted to a denial of a motion to vacate the Commission's original December 19, 1958 decision. In similar circumstances, the Court of Appeals for the Tenth Circuit recently stated in *Pan American Petroleum Corp. v. FPC*, 268 F. 2d 827, 830 (10th Cir. 1959):

> "To permit a dissatisfied party to challenge an order of the Commission in that manner more than thirty days after the entry of such order would effectively circumvent the requirement contained in section 19, supra for the filing of an application for rehearing within the thirty-day period as a prerequisite to judicial review."

It is apparent that by the filing of any kind of motion relating to a previous original decision more than thirty days after the original decision and then filing a timely petition for rehearing of the adverse Commission action on the untimely motion, new and limitless vistas for dilatory action are opened for bringing matters before the Court of Appeals which were not urged in a timely petition for rehearing of the original decision.

2. The Commission Lacked Jurisdiction to Consider the "Settlement Proposal"

The organic statute of the Federal Power Commission in its provision for rehearings, 15 U.S.C. 717r(a) states in pertinent portion:

> "Any person . . . aggrieved by an order issued by the Commission . . . may apply for a rehearing within thirty days after the issuance of such order.

> The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing . . ."

The Commission certainly went as far as it jurisdictionally could go when, in its opinion on rehearing, it did, contrary to the assertion of the Court of Appeals (App. I, *infra*, p. 33a n.), consider the untimely "settlement proposal" to the extent of finding that it was inconsistent with its prior order and would require substantial modification thereof (App. IV, *infra*, p. 51a).

During the past term, this Court had occasion to point out to the United States Court of Appeals for the District of Columbia Circuit that a statutory ten-day limit for filing a notice of appeal in a criminal case meant that a criminal case could not be entertained by the Court of Appeals if no notice of appeal was filed within ten days. *United States* v. *Robinson*, 80 S. Ct. 282 (1960). The Court spoke of the indefinite delay which would result from a judicial lack of adherence to the mandatory time limits of the statute. The Court concluded: "Certainly that possibility [indefinite delay] would unnecessarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it." 80 S. Ct. at 288-89 (footnote omitted). This Court's holding that a criminal defendant must file a notice of appeal within ten days after judgment in compliance with the statutory requirement applies with far greater impact to a large corporate party to a complex and protracted administrative case who unilaterally unfolds a proposal inconsistent with and re-

granting a drastic modification of the agency's decision after the statutory period of sixty days has passed in which such objections might be voiced. Absent a timely petition for rehearing in which this proposal was urged, the Commission was powerless to act on Michigan Consolidated's proposal, unless the plainly expressed Congressional intent is to be disregarded.

The Court of Appeals in its opinion denying rehearing sought justification for its order that the Commission consider on the merits Michigan Consolidated's "settlement proposal" by citing a Rule of Practice and Procedure of the Commission which provides: "Nothing contained in this section shall be construed as precluding any party to a proceeding from submitting at any time offers of settlement or proposals of adjustment to all parties and to the Commission . . ." 18 C.F.R. § 1.18(c) (1949). The Commission's Rule, of course, may not be construed, in derogation of the organic statute, to require so-called settlement proposals filed after the time for rehearing has passed to be considered by the Commission, thus making the finality of agency decisions depend only on the imagination of counsel for the losing party to devise additional pleadings to obstruct indefinitely a conclusion to a case. Moreover, the rule cannot be construed to require positive Commission action when the plain words specify only that submission of such settlement proposals are not precluded.

The fact is that Michigan Consolidated sought to reopen the record, but since the Commission had issued its final order, that avenue of attack was foreclosed by the Commission's Rules of Practice and Procedure governing petitions to reopen.[1] By designating its

[1] 18 C.F.R. § 1.23 (1949).

pleading a "proposal." Michigan Consolidated sought to do indirectly what it could not do directly—reopen the proceedings. The Court of Appeals has sanctioned this circumvention. Viewed realistically, Michigan Consolidated's proposal was simply a rearguard harassment which received the fullest Commission consideration possible under the mandate of Section 19(a) of the Act.

II.

AN AGENCY'S FINDINGS IN AN OPINION DENYING REHEARING MAY NOT BE STIGMATIZED AS INSUFFICIENT TO SUPPORT THE AGENCY'S ACTION FOR THE SOLE REASON THAT THEY WERE ADVANCED AFTER THE ORIGINAL DECISION.

A recurring problem in the judicial review of administrative cases is posed when the agency makes two independent and alternative findings, each of which supports a single ultimate determination, and a reviewing court disagrees with one of the two findings. That problem arose in this case when the Commission supported its finding of the Panhandle system's greater need for the gas by the above-described space heating saturation test in its original opinion and by the above-described capacity-demand ratio test in its opinion denying rehearing. In neither opinion did the Commission attribute a "controlling" significance to either or both of these tests. Indeed, in its opinion denying rehearing, the Commission expressly disclaimed that it had given controlling significance to the space heating saturation test (App. IV, *infra*, p. 58a).

The Court of Appeals disagreed with the calculation which was used in applying the space heating saturation test,[10] finding it to be the controlling consideration

[10] The petitioner's position with respect to this portion of the Court's holding is expressed in footnotes 8, *supra*, p. 10.

of the Commission, and was of the opinion that it did not need to pass on the validity of the capacity-demand ratio test because that test was found in the opinion denying rehearing, and for that sole reason was insufficient to support the finding of Panhandle's greater need (App. I, *infra*, p. 24a[11]).

If this Court sanctions and accepts the Court of Appeals' mechanistic approach to the findings of an administrative agency, the curative function of rehearings is *pro tanto* atrophied. The reason for rehearings in administrative agencies is to give the agency an opportunity to review its previous action in the light of objections to it and to give additional or alternative reasons for its action, or to change its findings and order if, on rehearing, it is of a different mind.[12] There would be little, if any, reason for agencies to entertain rehearing petitions if their findings in opinions denying rehearing, "even . . . if unassailable,"[13] can not be given controlling significance, and of themselves recognized as supporting the agency's action. If purported error in an alternative finding in the original opinion is held to require a remand automatically, and no finding appearing in an opinion denying rehearing can be given controlling significance, the curative effect of rehearings has been terminated by an oblique judicial fiat.

Certainly a closer qualitative analysis of the two tests than was vouchsafed by the Court of Appeals

[11] In *Cia Mexicana De Gas v. FPC*, 167 F. 2d 804 (5th Cir. 1948), the Court, after recognizing that the Commission could change its findings on rehearing stated: "If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether, as claimed by petitioners, the findings and order under review are without evidence to support them." 167 F. 2d at 810.

[12] App. I, *infra*, p. 24a.

was required to determine whether either of these findings were grounds which alone would support the finding of greater need. The relative physical location of the two independent and alternative findings in the Commission's opinions occupies the lowest rung in any such qualitative analysis.

An added consideration is the effect of the Court of Appeals' differentiation between findings in an original opinion and in an opinion denying rehearing on the "substantial evidence" rule governing the review of decisions of administrative agencies, authoritatively clarified by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474. There, this Court held that an agency's action was to be upheld if supported by "substantial evidence" on the record as a whole. Upon this unambiguous holding the Court of Appeals in the instant case has engrafted the following qualification: except that part of the record disclosed by the Commission in its opinion denying rehearing. Those findings, according to the logic of the Court of Appeals' ruling, even if based upon "substantial evidence," do not and cannot support a Commission's action simply because they were advanced after the original decision.

This distinction between findings in an original opinion and in an opinion denying rehearing is wholly without warrant or precedent and can lead only to an abandonment of the rehearing process, an encroachment on the statutory "substantial evidence" rule, and a corresponding material increase in the litigative burden of the agencies stemming from the increased flow of remands from the United States Courts of Appeals.

CONCLUSION

It is respectfully urged that writs of certiorari be issued directed to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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